IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-885

UNITED STATES OF AMERICA; GEORGE P. SHULTZ, Secretary of the Treasury; S. S. SOKOL, Commissioner of Accounts,

Petitioners,

—v.—

WILLIAM B. RICHARDSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OSMOND K. FRAENKEL
120 Broadway
New York, N. Y. 10005

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties Union Foundation
22 East 40th Street
New York, N. Y. 10016

JAMES R. KELLEY
14 W. Pittsburgh Street
Greensburg, Penna. 15601

Attorneys for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-885

UNITED STATES OF AMERICA; GEORGE P. SHULTZ, Secretary of the Treasury; S. S. SOKOL, Commissioner of Accounts,

Petitioners,

—v.—

WILLIAM B. RICHARDSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent does not challenge the formulation of the issue contained in the petition for certiorari (p. 2),[1] nor the statement of the case (pp. 2-6). Nor does he challenge the statement (p. 7) that the issue is important. But certiorari should be denied because the Court of Appeals' decision is consonant with settled decisions of this Court and does not conflict with any decisions by other courts of appeals.

1. The government urges that certiorari be granted because the decision of the court below "cannot be squared with this Court's decision in *Flast* v. *Cohen*, 392 U.S. 83, and goes far beyond the limited concept of standing there recognized" (p. 7). Specifically, the government asserts that respondent cannot demonstrate "a particular type of interest" in the challenged legislation, and therefore has

[1] All references are to the petition for certiorari.

no standing, because (1) "his suit is not directed at exercises of congressional power under the taxing and spending clause" (p. 8) and (2) "respondent cannot demonstrate . . . that the statute challenged exceeds a specific constitutional limitation of the congressional taxing and spending power" (p. 9).

The court below explicitly answered these claims in a way that satisfies the standards set forth by this Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968).

As to the first, the majority of the court below held that respondent's claim

> . . . is integrally related to the appropriations process and the taxpayer's ability to challenge those appropriations. Although *Flast* recognizes standing of a taxpayer to challenge expenditures, how can a taxpayer make that challenge unless he knows how the money is being spent? Without accurate official information concerning the amount and purpose of the expenditures, there could be no basis for a taxpayer suit (p. 13a).

As to the second branch of the government's argument, the majority of the court below held that

> [w]hile article I, section 9, clause 7 is procedural in nature, and while the establishment clause is substantive in nature, both are nonetheless limitations on the taxing and spending power. It would be difficult to fashion a requirement more clearly conveying the framers' intention to regularize expenditures and to require public accountability (p. 14a).

Judge Adams, for the minority below, based his dissent on two grounds. First, he declared that the "constitutional right presently asserted by the plaintiff would not appear to be . . . of such pre-eminent importance that the traditional standing requirements should be waived" (p. 50a). This consideration, however, is nowhere to be found in *Flast* and cannot be said to be relevant to the standing problem. Each part of the Constitution is as important as every other, and we suggest that Judge Adams has confused preeminence with judicial visibility. The fact that the clause may not have been previously litigated means only that it has not heretofore been claimed to have been breached.[3] It does not mean it is not important.

Second, Judge Adams concluded that the respondent suffered no "personal injury sufficient to enable him to litigate the underlying issue" and that "he has merely a general interest common to all members of the public" (p. 51a). Judge Adams consequently acknowledges, as he must, that the constitutional provision at issue in this case could never be litigated.

But as the majority below noted, "[a] decision to deny standing to the [respondent] in these circumstances would not seem consistent with the limited scope of the standing requirement. See *Sierra Club* v. *Morton*, —— U.S. ——, ——, 40 U.S.L.W. 4397, 4401 (1972)."

---

[3] The government asserts in its petition that "this clause [Art. I, Sec. 9, cl. 7] means only that no money can be paid from the Treasury unless first appropriated by Congress and reported in accord with that appropriation" (p. 9). This assertion is baseless. The three cases cited in support of it involved construction only of the phrase, "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law," but did not involve the phrase on which the respondent relies: "and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

In sum, there was a sound basis for the court below to conclude that respondent satisfies the two-pronged standing test enunciated in *Flast*. First, he is challenging the constitutionality of statutes which purport to alter the constitutional conditions governing the expenditure of public money. By definition this is a matter integrally related to the taxing and spending power. Second, the basis of respondent's challenge to these statutes is that they offend a specific constitutional limitation—one which unqualifiedly requires that public money shall not be expended without a public accounting.

Furthermore, in a democracy there can be no greater public good than full disclosure of governmental operations. Otherwise the public is not informed and citizens cannot properly perform their functions as voters. Cf. *DeJonge* v. *Oregon*, 299 U.S. 353, 365 (1937). That was well understood by the Founding Fathers and led to the inclusion in the Constitution of the unequivocal command of Art. I, Section 9, clause 7. As the majority below correctly observed, unless a citizen and taxpayer has standing to invoke this provision it might just as well not be in the Constitution (p. 15a). When this Court permitted a taxpayer in *Flast* to challenge the use of federal moneys for a purpose allegedly violative of the First Amendment, it recognized that the time had come to abandon the old narrow view expressed in *Frothingham* v. *Mellon*, 262 U.S. 447 (1923).

2. The government's contention (p. 10) that the decision below conflicts with other federal decisions is not correct. Not one of the cases cited in the petition presented a problem like the one in the case at bar.

In *Velvel* v. *Nixon*, 415 F.2d 236 (10th Cir. 1969), the suit sought a declaration that the conflict in Vietnam was unconstitutional since war had not been declared by Congress. But plaintiff in that case, a professor of constitutional law beyond draft age, obviously had no specific interest in the issue, whereas respondent citizen and taxpayer in the instant case has the specific interest in knowing what his government has done and is doing with the money raised by taxation so that he can exercise his functions as elector.

Troutman v. *Shriver*, 417 F.2d 171 (5th Cir. 1969), involved a challenge to the constitutionality of the Economic Opportunity Act of 1964 by bar associations and a taxpayer-citizen-lawyer, persons to whom the Act did not apply, who consequently were unable to show any injury to themselves.

Pietsch v. *President of the United States*, 434 F.2d 861 (2nd Cir. 1970), sought an injunction against collection of an income tax surcharge and a declaration that the Vietnam conflict was unconstitutional. The court of appeals upheld the dismissal of the complaint for failure to allege expenditures in violation of a specific constitutional prohibition. But in the case at bar respondent does challenge expenditures made in direct violation of the constitutional command that there be a public accounting.

Lamm v. *Volpe*, 449 F.2d 1202 (10th Cir. 1971), sought to challenge a statute controlling outdoor advertising. Plaintiff purported to act on behalf of residents of Colorado, but had no interest affected by the challenged regulation and could not point to a specific constitutional prohibition.

It is difficult to understand petitioners' reference to *Essex County Welfare Board* v. *Cohen*, 299 F. Supp. 176

(D.N.J. 1969). There the Court held that a state welfare board had standing to seek relief for welfare recipients and that the mothers of children receiving aid also had standing. It denied standing only to the director of the board suing as taxpayer because his challenge to the law did not rest on his status as taxpayer.

Finally, petitioners refer to an earlier case brought by respondent, *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D. Pa. 1970) which challenged statutory pay increases of federal employees on the ground that the law granting them violated the separation of powers. But there the decision rested on the district court's conclusion that the challenged expenditure did not stem from the taxing power and, therefore, plaintiff could not establish standing within *Flast*.

Not one of these cases touches on the standing of a citizen-taxpayer to challenge a violation of the direct command of the Constitution enacted for the benefit of all members of the public so that they should be properly informed of the activities of their government. Thus there is no conflict between the decision below and decisions of other lower federal courts on the threshold issue of respondent's standing to sue.

3. Furthermore, the court below has decided only the issue of standing and has remanded the case to a three-judge district court to consider the merits of respondent's claim that the statute exempting the budget of the Central Intelligence Agency from the requirements of Article I, Section 9, Clause 7 is unconstitutional. Accordingly, this case lacks finality, and that fact "of itself alone furnishe[s] sufficient ground for the denial [of] certiorari." *Hamilton-*

Brown Shoe Company v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See also *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *American Construction Co.* v. *Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893).

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

OSMOND K. FRAENKEL
120 Broadway
New York, N. Y. 10005

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties
Union Foundation
22 East 40th Street
New York, N. Y. 10016

JAMES R. KELLEY
14 W. Pittsburgh Street
Greensburg, Penna. 15601

Attorneys for Respondent

January 1973